

1
2
3
4
5
6
7
8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA
10

11 LAWRENCE MAURICE MARTIN,) Civil No. 14cv1694 DMS(RBB)
12)
13) Petitioner,)
14) **REPORT AND RECOMMENDATION**
15) **GRANTING RESPONDENT'S MOTION**
16) **TO DISMISS [ECF NO. 14]**
17)
18) v.)
19)
20) JEFFREY BEARD, Secretary, et)
21) al.)
22)
23) Respondents.)
24)
25)
26)
27)
28)

17 Petitioner Lawrence Maurice Martin, a state prisoner
18 proceeding pro se and in forma pauperis, filed a Petition for Writ
19 of Habeas Corpus pursuant to 28 U.S.C. § 2254 on July 17, 2014 [ECF
20 Nos. 1, 7].¹ On December 18, 2014, Respondent Jeffrey Beard, the
21 secretary of the California Department of Corrections and
22 Rehabilitation ("CDCR"), filed a Motion to Dismiss the Petition for
23 Writ of Habeas Corpus (the "Motion to Dismiss") along with a Notice
24 of Lodgment [ECF Nos. 14, 15]. Respondent moves to dismiss the
25 Petition as untimely under the statute of limitations as set forth
26

27
28 ¹ The Court will cite to all documents using the page numbers
assigned by the Court's electronic case filing system.

1 by the Antiterrorism and Effective Death Penalty Act. (Mot.
2 Dismiss 3-9, ECF No. 14.)

3 Martin filed an Opposition to Respondent's Motion to Dismiss
4 Petition for Writ of Habeas Corpus [ECF No. 16] (the "Opposition")
5 on January 23, 2015. The Court noted that some of the attachments
6 to the Opposition were missing. (See Mins., Feb. 18, 2015, ECF No.
7 17.) In response, Petitioner provided the missing attachments on
8 March 13, 2015 [ECF No. 18]. The Court, on March 18, 2015,
9 requested supplemental documents and a reply from Respondent [ECF
10 No. 19]. Beard filed the supplemental papers on April 6, 2015 [ECF
11 No. 21], and his Reply to Petitioner's Opposition ("Reply") on
12 April 14, 2015 [ECF No. 23].

13 The Court has reviewed the Petition, the Motion to Dismiss,
14 the lodgments, the Opposition, the Reply, and the supplemental
15 documents provided by both parties. For the reasons discussed
16 below, Respondent's Motion to Dismiss [ECF No. 14] should be
17 **GRANTED.**

18 I. FACTUAL AND PROCEDURAL BACKGROUND

19 On March 26, 2012, Petitioner was involved in a physical
20 altercation with another inmate and was charged with battery
21 resulting in serious injury. (Lodgment No. 6, In re Martin, No.
22 D064732, order at 1 (Cal. Ct. App. Oct. 30, 2013).) Martin was
23 found guilty and lost 360 days of post-conviction credits as a
24 result. (Lodgment No. 2, Rules Violation Report -- Part C at 2,
25 [In re Martin] (June 13, 2012) (log number FD-12-03-032).) He was
26 also referred to the Institutional Classification Committee to
27 determine if he should be placed in a secured housing unit. (Id.)
28

petition is filed on the date a petitioner hands it to prison authorities for mailing. Houston v. Lack, 487 U.S. 266, 276 (1988); Campbell v. Henry, 614 F.3d 1056, 1059-60 (9th Cir. 2010); see Rule 3(d), Rules Governing Section 2254 Cases, foll. 28 U.S.C.A. § 2254 (West 2006). Under this rule, the Court considers the Petition filed on July 13, 2014, the date Petitioner signed and mailed it.

Because Martin filed his Petition after April 24, 1996, it is subject to the Antiterrorism and Effective Death Penalty Act ("AEDPA") of 1996. See Woodford v. Garceau, 538 U.S. 202, 204 (2003). AEDPA sets forth the scope of review for federal habeas corpus claims:

The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

28 U.S.C.A. § 2254(a) (West 2006); see Hernandez v. Ylst, 930 F.2d 714, 719 (9th Cir. 1991). In 1996, Congress "worked substantial changes to the law of habeas corpus." Moore v. Calderon, 108 F.3d 261, 263 (9th Cir. 1997). Amended § 2254(d) now reads:

An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim-

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

1 (2) resulted in a decision that was based on an
2 unreasonable determination of the facts in
3 light of the evidence presented in the State
4 court proceeding.

28 U.S.C.A. § 2254(d).

5 To present a cognizable federal habeas corpus claim, a state
6 prisoner must allege that his conviction was obtained "in violation
7 of the Constitution or laws or treaties of the United
8 States." See id. § 2254(a). Petitioner must allege that the state
9 court violated his federal constitutional rights. See Reed v.
10 Farley, 512 U.S. 339, 347 (1994); Hernandez, 930 F.2d at 719;
11 Jackson v. Ylst, 921 F.2d 882, 885 (9th Cir. 1990).

12 A federal district court does "not sit as a 'super' state
13 supreme court" with general supervisory authority over the proper
14 application of state law. Smith v. McCotter, 786 F.2d 697, 700
15 (5th Cir. 1986); see also Lewis v. Jeffers, 497 U.S. 764, 780
16 (1990) (holding that federal habeas courts must respect a state
17 court's application of state law); Jackson, 921 F.2d at 885
18 (concluding that federal courts have no authority to review a
19 state's application of its law). Federal courts may grant habeas
20 relief only to correct errors of federal constitutional magnitude.
21 Oxborrow v. Eikenberry, 877 F.2d 1395, 1400 (9th Cir. 1989)
22 (stating that federal courts are not concerned with errors of state
23 law unless they rise to the level of a constitutional violation).

24 The Supreme Court, in Lockyer v. Andrade, 538 U.S. 63 (2003),
25 stated that "AEDPA does not require a federal habeas court to adopt
26 any one methodology in deciding the only question that matters
27 under § 2254(d)(1) – whether a state court decision is contrary to,
28 or involved an unreasonable application of, clearly established

1 Federal law." Id. at 71 (citation omitted). In other words, a
 2 federal court is not required to review the state court decision de
 3 novo. Id. Rather, a federal court can proceed directly to the
 4 reasonableness analysis under § 2254(d)(1). Id.

5 The "novelty" in § 2254(d)(1) is "the reference to 'Federal
 6 law, as determined by the Supreme Court of the United States.'"
 7 Lindh v. Murphy, 96 F.3d 856, 869 (7th Cir. 1996) (en banc), rev'd
 8 on other grounds, 521 U.S. 320 (1997). Section 2254(d)(1)
 9 "explicitly identifies only the Supreme Court as the font of
 10 'clearly established' rules." Id. "A state court decision may not
 11 be overturned on habeas review, for example, because of a conflict
 12 with Ninth Circuit-based law" Moore, 108 F.3d at 264.
 13 "[A] writ may issue only when the state court decision is 'contrary
 14 to, or involved an unreasonable application of,' an
 15 authoritative decision of the Supreme Court." Id.; see Baylor v.
 16 Estelle, 94 F.3d 1321, 1325 (9th Cir. 1996); Childress v. Johnson,
 17 103 F.3d 1221, 1225 (5th Cir. 1997); Devin v. DeTella, 101 F.3d
 18 1206, 1208 (7th Cir. 1996).

19 [A] state court decision is "contrary to [the Supreme
 20 Court's] clearly established precedent if the state court
 21 applies a rule that contradicts the governing law set
 22 forth in [the Court's] cases" or "if the state court
 23 confronts a set of facts that are materially
 24 indistinguishable from a decision of [the] Court and
 25 nevertheless arrives at a result different from . . .
 26 precedent."

27 Lockyer, 538 U.S. at 73 (quoting Williams v. Taylor, 529 U.S. 362,
 28 405-06 (2000)). A state court unreasonably applies federal law if
 its application is "objectively unreasonable," which is "more than
 [being] incorrect or erroneous." Id. at 75.

III. DISCUSSION

A. AEDPA's One-Year Statute of Limitations

Respondent Beard argues that the Petition is untimely. (Mot. Dismiss 3-9, ECF No. 14.) The statute of limitations for federal habeas corpus petitions is set forth in § 2244(d), which provides in relevant part:

(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of --

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

28 U.S.C.A. § 2244(d)(1) (West 2006).

A federal petition for writ of habeas corpus may be dismissed with prejudice when it was not filed within AEDPA's one-year statute of limitations. Jiminez v. Rice, 276 F.3d 478, 482-83 (9th Cir. 2001). The statute of limitations is a threshold issue that must be resolved before the merits of individual claims. See White v. Klitzkie, 281 F.3d 920, 921-22 (9th Cir. 2002).

In most cases challenging a conviction or sentence, the limitation period begins running on the date that the petitioner's

1 judgment became final because direct review had concluded or the
2 time for seeking direct review had expired. 28 U.S.C.A.
3 § 2244(d)(1)(A). Where, however, "a habeas petitioner challenges
4 an administrative decision affecting the 'fact or duration of his
5 confinement,' AEDPA's one-year statute of limitations runs from
6 when the 'factual predicate' of the habeas claims 'could have been
7 discovered through the exercise of due diligence.'" Mardesich v.
8 Cate, 668 F.3d 1164, 1172 (9th Cir. 2012) (quoting 28 U.S.C.
9 § 2244(d)(1)(D)). Typically, the factual predicate is the denial
10 of an administrative appeal. See Shelby v. Bartlett, 391 F.3d
11 1061, 1066 (9th Cir. 2004) (holding that the statute of limitations
12 begins to run when the petitioner's administrative appeal was
13 denied); Redd v. McGrath, 343 F.3d 1077, 1079 (9th Cir. 2003)
14 (holding that the Board of Prison Term's denial of an inmate's
15 administrative appeal was the "factual predicate" of the inmate's
16 claim that triggered the commencement of the limitations period).

17 Respondent maintains that the factual predicate for Martin's
18 federal claims arose on November 5, 2012, when the final
19 administrative appeal challenging the investigation was concluded.
20 (Mot. Dismiss 4-5, ECF No. 14 (citing Lodgment No. 3, Third Level
21 Appeal Decision, In re Martin, TLR Case No.: 1202739).) The
22 limitations period, Beard asserts, began to run the next day,
23 November 6, 2012. (Id. at 5 (citing Patterson v. Stewart, 251 F.3d
24 1243, 1245-47 (9th Cir. 2001)).) Under 28 U.S.C. § 2244(d),
25 Petitioner had one year from that date, or until Monday, November
26 7, 2013, to file his federal petition for writ of habeas corpus.
27 See Fed. R. Civ. P. 6(a)(1)(C) ("[I]n computing any time period
28 specified . . . in any statute . . . include the last day of the

1 period, but if the last day is a Saturday, Sunday, or legal
2 holiday, the period continues to run until the end of the next day
3 that is not a Saturday, Sunday, or legal holiday."); see Patterson,
4 251 F.3d at 1246 (holding that the statute of limitations is to be
5 calculated according to Fed. R. Civ. P. 6(a)). Martin brought this
6 action on July 13, 2014, approximately eight months after the
7 limitations period had expired. Absent any applicable tolling, the
8 Petition is untimely.

9 **B. Statutory Tolling**

10 The statute of limitations under AEDPA is tolled during
11 periods in which a "properly filed" habeas corpus petition is
12 "pending" in the state courts. 28 U.S.C.A. § 2244(d)(2). The
13 statute specifically provides, "The time during which a properly
14 filed application for State post-conviction or other collateral
15 review with respect to the pertinent judgment or claim is pending
16 shall not be counted toward any period of limitation under this
17 subsection." Id.; see Pace v. DiGuiglielmo, 544 U.S. 408, 410
18 (2005). "[A]n application is 'properly filed' when its delivery
19 and acceptance are in compliance with the applicable laws and rules
20 governing filings." Artuz v. Bennett, 531 U.S. 4, 8 (2000)
21 (explaining that typical filing requirements include all relevant
22 time limits).

23 The interval between the disposition of one state petition and
24 the filing of another may be tolled under "interval tolling." See
25 Carey v. Saffold, 536 U.S. 214, 223 (2002). "[T]he AEDPA statute
26 of limitations is tolled for 'all of the time during which a state
27 prisoner is attempting, through proper use of state court
28 procedures, to exhaust state court remedies with regard to a

particular post-conviction application.'" Nino v. Galaza, 183 F.3d 1003, 1006 (9th Cir. 1999) overruled on other grounds by Harris v. Carter, 515 F.3d 1051, 1053 (9th Cir. 2008) (quoting Barnett v. Lamaster, 167 F.3d 1321, 1323 (10th Cir. 1999)); see Carey, 536 U.S. at 219-20. The statute of limitations is tolled from the time a petitioner's first state habeas petition is filed until state collateral review is concluded, but it is not tolled before the first state collateral challenge is filed. Thorson v. Palmer, 479 F.3d 643, 646 (9th Cir. 2007) (citing Nino, 183 F.3d at 1006). "The period that an application for post-conviction review is pending is not affected or 'untolled' merely because a petitioner files additional or overlapping petitions before it is complete." Delhomme v. Ramirez, 340 F.3d 817, 820 (9th Cir. 2003), abrogated on other grounds as recognized by Waldrip v. Hall, 548 F.3d 729, 733 (9th Cir. 2008).

As stated above, the limitations period began to run on November 6, 2012. Martin's state petition for a writ of habeas corpus was constructively filed in Fresno County Superior Court on June 13, 2013. (See Lodgment No. 4, In re Martin, No. 13CRWR681554 (petition for writ of habeas corpus at 8-9).)² This 220-day span is not statutorily tolled and counts toward the one-year limitations period. See Thorson, 479 F.3d at 646. The superior

² Even though Martin did not file his superior court petition in the proper court, he should still be given the benefit of the June 13, 2013 constructive filing date. See Griffin v. Foulk, No. 2:14-CV-00837 TLN AC P, 2014 WL 4546018, at *3-4 (E.D. Cal. Sept. 12, 2014); Daniels v. Swarthout, No. CIV S-10-3347 KJM DAD P, 2011 WL 4048529, at *3 (E.D. Cal. Sept. 9, 2011).

1 court denied the petition on August 12, 2013. (Opp'n 13-15, ECF
2 No. 16).

3 Martin next filed a petition with the California Court of
4 Appeal that was denied on October 30, 2013. (Lodgment No. 6, In re
5 Martin, No. D064732, order.) He then waited 130 days, until March
6 9, 2014, to file his petition with the California Supreme Court.
7 (Lodgment No. 7, In re Martin, No. S217309 (petition for writ of
8 habeas corpus).) Respondent argues that the unexplained delay in
9 filing Martin's petition with the state supreme court is
10 unreasonable, and he should not be entitled to gap tolling for this
11 period. (Mot. Dismiss 6-7, ECF No. 14.)

12 Statutory tolling applies to "intervals between a lower court
13 decision and a filing of a new petition in a higher court"
14 Carey, 536 U.S. at 223. A petitioner is thus entitled to statutory
15 tolling, "not only for the time that his petitions were actually
16 under consideration, but also for the intervals between filings,
17 while he worked his way up the ladder[,]" Biggs v. Duncan, 339 F.3d
18 1045, 1048 (9th Cir. 2003) (citing Carey, 536 U.S. at 223), as long
19 as the filings were timely, Carey, 536 U.S. at 225-26.

20 In California, a petition for collateral review is timely if
21 filed within a "reasonable" amount of time; this contrasts with
22 states that specify a time limit, usually thirty or forty-five
23 days. Carey, 536 U.S. at 222-23. Martin waited 130 days after the
24 court of appeal denied his petition to file with the California
25 Supreme Court. The petition to the higher court was not filed
26 within a "reasonable time," presumptively thirty to sixty days.
27 See Evans v. Chavis, 546 U.S. 189, 192-93 (2005). "[I]f the
28 successive petition was not timely filed, the period between

1 petitions is not tolled." Banjo v. Ayers, 614 F.3d 964, 969 (9th
 2 Cir. 2010). The 130 days between the denial by the court of appeal
 3 and the filing with the state supreme court is not statutorily
 4 tolled and must be counted toward the limitations period. See
 5 Livermore v. Sandor, 487 F. App'x 342, 343-44 (9th Cir. 2012)
 6 (concluding that delay of seventy-six days between state habeas
 7 petitions was unreasonable); Velasquez v. Kirkland, 639 F.3d 964,
 8 968 (9th Cir. 2011) (finding delays of eighty-one and ninety-one
 9 days were unreasonable).³

10 The habeas corpus petition Martin filed with the California
 11 Supreme Court was denied on May 14, 2014. (Lodgment No. 8,
 12 California Appellate Courts: Case Information, [http://
 13 appellatecases.courtinfo.ca.gov (select "Supreme Court," search
 14 using the supreme court case number, then select "Docket")].) "The
 15 statute of limitations period is . . . not tolled after state
 16 post-conviction proceedings are final and before federal habeas
 17 proceedings are initiated." Roy v. Lampert, 465 F.3d 964, 968 (9th
 18 Cir. 2006) (citing 28 U.S.C. § 2244(d)(2)). A decision of the
 19 California Supreme Court becomes final upon filing. Phelps v.
 20 Alameda, 366 F.3d 722, 724 n.1 (9th Cir. 2004); Burton v. Cate, No.
 21 10-1797-WQH(WVG), 2011 WL 4529664, at *4 n.3 (S.D. Cal. June 17,

22
 23 ³ The Court notes that fifty-two days elapsed between the
 24 time the superior court denied the petition and the date Martin
 25 constructively filed his petition in the California Court of
 26 Appeal. (See Opp'n 13-15, ECF No. 16 (showing that Petitioner's
 27 superior court petition was denied on August 12, 2013); Resp't's
 28 Supplemental Notice Lodgment Attach. #1 Pet. Writ Habeas Corpus 12,
 ECF No. 21 (showing that Martin constructively filed his petition
 in the California Court of Appeal on or around October 3, 2013).)
 Fifty-two days is a presumptively reasonable amount of time for
 purposes of statutory tolling; this period is tolled. See Evans,
 546 U.S. at 192-93.

1 2011). Thus, the time period from the denial of Martin's petition
2 by the California Supreme Court to the filing of his federal habeas
3 petition is not statutorily tolled. Petitioner constructively
4 filed his federal petition on July 13, 2014, or sixty days after
5 the California Supreme Court denied his petition. This period must
6 be counted against the one-year limitations period.

7 The statute of limitations in this case was running for 220
8 days before Petitioner filed his first state habeas petition, 130
9 days between the court of appeal's denial of Martin's petition and
10 the filing of the next petition with the California Supreme Court,
11 and 60 days between the date the California Supreme Court denied
12 his petition and Martin constructively filed his federal habeas
13 petition. The three periods when the limitations period was not
14 tolled total 410 days, which exceeds AEDPA's one-year statute. See
15 28 U.S.C.A. § 2244(d)(1)(A). Accordingly, Petitioner is not
16 entitled to statutory tolling.

17 **C. Equitable Tolling**

18 In the Motion to Dismiss, Respondent Beard asserts that Martin
19 is not entitled to equitable tolling because he fails to show that
20 he has proceeded diligently or that "extraordinary circumstances
21 prevented him from filing the Petition in a timely manner"
22 (Mot. Dismiss 9, ECF No. 14.) Indeed, equitable tolling of the
23 statute of limitations is appropriate when the petitioner can show
24 "'(1) that he has been pursuing his rights diligently, and (2) that
25 some extraordinary circumstance stood in his way'" Holland
26 v. Florida, 560 U.S. 631, 632 (2010) (quoting Pace, 544 U.S. at
27 418); see Lawrence v. Florida, 549 U.S. 327, 335 (2007) (same). A
28 petitioner is entitled to equitable tolling of AEDPA's one-year

statute of limitations where "'extraordinary circumstances beyond a prisoner's control made it impossible'" to file a timely petition. Spitsyn v. Moore, 345 F.3d 796, 799 (9th Cir. 2003) (quoting Brambles v. Duncan, 330 F.3d 1197, 1202 (9th Cir. 2003)).

"'[T]he threshold necessary to trigger equitable tolling [under AEDPA] is very high, lest the exceptions swallow the rule.'" Miranda v. Castro, 292 F.3d 1063, 1066 (9th Cir. 2002) (quoting United States v. Marcello, 212 F.3d 1005, 1010 (7th Cir. 2000)).

The failure to file a timely petition must be the result of external forces, not the result of the petitioner's lack of diligence. Miles v. Prunty, 187 F.3d 1104, 1107 (9th Cir. 1999). "Determining whether equitable tolling is warranted is a 'fact-specific inquiry.'" Spitsyn, 345 F.3d at 799 (quoting Frye v. Hickman, 273 F.3d 1144, 1146 (9th Cir. 2001)).

"'[A] prisoner's lack of knowledge that the state courts have reached a final resolution of his case can provide grounds for equitable tolling if the prisoner has acted diligently in the matter.'" Ramirez v. Yates, 571 F.3d 993, 997 (9th Cir. 2009) (citations omitted). To determine if a petitioner is entitled to equitable tolling on this basis, courts must consider (1) the date the petitioner actually received notice, (2) whether the petitioner acted diligently in obtaining notice and (3) "whether the alleged delay of notice caused the untimeliness of his filing and made a timely filing impossible[.]" Id. at 998.

1. Delay in filing superior court petition

In the Opposition, Martin insists that he was delayed in filing his petition in superior court because he had limited access to the law library. (Opp'n 3, ECF No. 16.) Yet, Petitioner does

1 not explain how this limited access made it impossible for him to
2 file a timely petition. Martin's conclusory assertions fail to
3 show that he is entitled to equitable tolling on this basis. See
4 Ramirez, 571 F.3d at 998 (holding that petitioner was not entitled
5 to equitable tolling due to restricted library access while in
6 administrative segregation); Frye, 273 F.3d at 1146 (rejecting
7 argument that lack of access to library materials automatically
8 qualifies as grounds for equitable tolling); Bravo v. Neotti, Civil
9 No. 12-CV-0571-DMS(PCL), 2013 U.S. Dist. LEXIS 106670, at *12 (S.D.
10 Cal. June 5, 2013) ("Where prison lockdowns and restrictive
11 policies regarding hours of library access provided a petitioner
12 with limited access to the law library, he was still not granted
13 equitable tolling because he failed to establish how the limited
14 access interfered with his ability to file a federal petition on
15 time." (citing Shoots v. Lamarque, 86 F. App'x 323, 324 (9th Cir.
16 2004)).)

17 **2. Delay in filing petition with California Supreme Court**

18 Next, Petitioner provides two reasons why he is purportedly
19 entitled to equitable tolling of the time period between the
20 California Court of Appeal's denial of his petition and the filing
21 of his petition in the California Supreme Court. (Opp'n 4-5, ECF
22 No. 16; see id. at 29.) First, he argues that he transferred
23 prisons after filing his petition in the court of appeal and
24 therefore did not receive the appellate court's opinion until over
25 four months after it was issued. (Id. at 4-5.) Second, he insists
26 that he was delayed in filing because some of his personal property
27 was temporarily lost due to the prison transfers. (Id. at 4.)
28

a. Delayed receipt of court of appeal's opinion

Martin contends that the delay in filing his petition with the California Supreme Court was partly due to the fact that he did not receive the California Court of Appeal's October 30, 2013 denial of his petition until March of 2014. (Id. at 5.)⁴ After filing his petition with the appellate court, Martin was transferred from Ironwood State Prison ("Ironwood") to another facility. (Id. at 4.) He returned to Ironwood on January 30, 2014, and on February 19, 2014, he sent a letter to the court of appeal inquiring about the status of his case. (See id. at 26.) On March 3, 2014, the court responded by notifying him that his petition had been ruled on earlier. (Id. at 24; see id. at 29.) Martin constructively filed a petition with the California Supreme Court six days later, on March 9, 2014. (See Lodgment No. 7, In re Martin, No. S217309 (petition for writ of habeas corpus).)

In the Reply, Beard concedes that according to Ramirez v. Yates, 571 F.3d at 997, a delay in receiving a court's ruling may, under some circumstances, be grounds for equitable tolling. (Reply 3-4, ECF No. 23.) Respondent urges that Ramirez is distinguishable, however, because in that case, "the petitioner's late notice was due to no fault of his own, and instead was because the state appellate court was late in sending out its order." (Id. at 4 (citing Ramirez, 571 F.3d at 997).) Here, Respondent argues that Martin caused the delay by failing to notify the California

⁴ Petitioner's statement that he received notice of the California Court of Appeal's ruling in March of 2015 -- rather than March of 2014 -- appears to be a typographical error. (See id.)

1 Court of Appeal that his address had changed after transferring to
2 a different facility. (Id.)

3 Beard asserts that Ramirez is also distinguishable because it
4 may only allow for equitable tolling due to delay in receiving "the
5 state court's 'final resolution'" of a case. (Id.) For Martin,
6 that would have been the California Supreme Court's ruling. (Id.)
7 Because the delayed opinion in this case was from the court of
8 appeal, Beard maintains that Ramirez does not extend to the
9 "intermediary state court ruling." (Id.)

10 Even assuming Ramirez applies, Respondent claims that Martin
11 is not entitled to tolling. (Id. at 4-6.) The secretary of the
12 CDCR contends that Petitioner failed to act diligently in obtaining
13 notice from the court of appeal because he did not notify the court
14 that his address had changed. (Id. at 4-5 (citing Ramirez, 571
15 F.3d at 997-98).) Beard also alleges that Petitioner has failed to
16 prove, as required under Ramirez, that the delay in receipt of the
17 California Court of Appeal's opinion made the timely filing of his
18 federal petition impossible. (Id. (citing Ramirez, 571 F.3d at
19 997-98).) Respondent insists, "[N]otwithstanding his purportedly
20 late notice of the appellate court order, Martin's California
21 Supreme Court action was completed with at least 15 days remaining
22 before the statute of limitations elapsed during which time he
23 could have filed his federal petition in a timely manner." (Id. at
24 6.)

25 Finally, as a general matter, Beard contends that Petitioner
26 has not diligently pursued his claims. (Id.) Because Martin
27 waited 220 days before filing his petition in Fresno County
28 Superior Court and 130 days before filing with the California

1 Supreme Court, he failed to proceed diligently. (Id.) According
 2 to Beard, Martin's lack of diligence is further evidenced by the
 3 fact that he waited sixty days after the California Supreme Court's
 4 denial to seek habeas corpus relief in this Court. (Id. at 7.)

5 Petitioner was incarcerated at Ironwood when he mailed his
 6 petition to the California Court of Appeal on October 3, 2013.
 7 (See Opp'n 4, ECF No. 16.) On the first page of the petition, he
 8 provided the court with his Ironwood address. (See Resp't's
 9 Supplemental Notice Lodgment Attach. #1 Pet. Writ Habeas Corpus 1,
 10 ECF No. 21.) Shortly thereafter, on October 15, 2013, Martin was
 11 transferred to the California Institute for Men. (See Opp'n 4, ECF
 12 No. 16.) Then, on October 24, 2013, he was moved to Santa Clara
 13 County Main Jail where he remained until January 30, 2014, when he
 14 returned to Ironwood. (Id. at 4, 26.) During this period of time,
 15 the California Court of Appeal attempted to send its decision to
 16 Petitioner on four separate occasions. See Appellate Courts Case
 17 Information, California Courts,
 18 <http://appellatecases.courtinfo.ca.gov/> (select "Fourth Appellate
 19 District Div 1," search using case number D064732, then select
 20 "Docket").⁵

21 It was not until after Petitioner returned to Ironwood that,
 22 on February 19, 2014, he sent a letter to the court of appeal
 23 inquiring about the status of his petition. (See Opp'n 5, 26, ECF
 24

25 ⁵ The Court sua sponte takes judicial notice of the
 26 California Court of Appeal's docket. See Fed. R. Civ. P. 201(c)(1)
 27 ("The Court may take judicial notice on its own."); Harris v. Cnty.
 28 of Orange, 682 F.3d 1126, 1131-32 (9th Cir. 2012) ("We may take
 judicial notice of undisputed matters of public record, including
 documents on file in federal or state courts.") (citations
 omitted).

1 No. 16.) In the letter, he noted that he did not file a notice of
2 change of address because he did not know his case number. (Id. at
3 26.) On March 6, 2014, Martin received a response from the
4 appellate court notifying him that his petition had been ruled on.
5 (See id. at 24; Pet'r's Notice Lodgment 5, ECF No. 18.) He filed a
6 petition with the California Supreme Court on March 9, 2014. (See
7 Lodgment No. 7, In re Martin, No. S217309 (petition for writ of
8 habeas corpus).)

9 Respondent suggests, and this Court agrees, that there is some
10 question about the applicability of Ramirez, 571 F.3d at 997, to
11 this case. In Ramirez, as noted, the Ninth Circuit held that "'a
12 prisoner's lack of knowledge that the state courts have reached a
13 final resolution of his case'" may provide a basis for equitable
14 tolling. See Ramirez, 571 F.3d at 997 (emphasis added) (quoting
15 Woodward v. Williams, 263 F.3d 1135, 1143 (10th Cir. 2001)). The
16 term "final resolution" may imply that equitable tolling is not
17 available for rulings from appellate courts where the state supreme
18 court or United States Supreme Court subsequently reviewed the
19 state habeas corpus petition.

20 Yet, Ramirez was remanded to the district court to consider
21 the circumstances surrounding the delay in petitioner's receipt of
22 the ruling from the superior court, which implies a more broad
23 applicability of the rule. See id. at 996, 998; see also Dominguez
24 v. Brazelton, No. C 12-6288 LHK (PR), 2014 WL 94324, at *4 (N.D.
25 Cal. Jan. 9, 2014) (describing Ramirez as a case where the "state
26 superior court failed to give notice of its decision"); Banks v.
27 Walker, No. 2:07-CV-02022-AK, 2010 WL 5200920, at *2 (E.D. Cal.
28 Dec. 15, 2010) (same). Some courts have noted the limited scope of

1 Ramirez. See Retano v. Janda, No. CV 12-8214-GW (OP), 2013 WL
2 6499702, at *4 n.4 (C.D. Cal. Dec. 10, 2013); Thomas v. Gonzalez,
3 No. EDCV09-01736AG(SS), 2010 WL 1266773, at *6-7 (C.D. Cal. Feb.
4 19, 2010). Other courts have interpreted Ramirez broadly. See
5 Niebla v. Janda, No. CV 12-4263-CAS(E), 2013 WL 1688346, at *8
6 (C.D. Cal. Feb. 20, 2013) (applying Ramirez to delayed receipt of
7 superior court's ruling but concluding that petitioner failed to
8 show that delayed notice caused the untimely federal petition);
9 accord Walker v. Brazelton, No. 1:11-CV-00585-AWI-SKO-HC, 2013 WL
10 71779, at *10-11 (E.D. Cal. Jan. 7, 2013); Aquilera-Guerra v. Ryan,
11 No. CV-12-258-PHX-NVW (BSB), 2012 WL 6765589, at *4-5 (D. Ariz.
12 Dec. 7, 2012).

13 Without discussing Ramirez, in Nedds v. Calderon, 678 F.3d
14 777, 783 n.4 (9th Cir. 2012), the Ninth Circuit addressed a set of
15 facts analogous to those in this case. There, the petitioner
16 argued that he was entitled to tolling because he did not receive
17 the California Court of Appeal's denial of his petition in a timely
18 manner. (Id.) The court did not have a correct address for the
19 petitioner after he transferred to a different prison. Id.
20 Because Nedds did not notify the court of his change of address,
21 the Ninth Circuit held that the delayed notice of the court ruling
22 did not entitle him to statutory or equitable tolling for that
23 period of time. Id. ("An . . . unrepresented party whose address
24 . . . changes while a case is pending must promptly serve and file
25 a written notice of the change in the reviewing court in which the
26 case is pending.".) (alterations in original) (citing Cal. R. Ct.
27 8.32(b)(1)). Nedds was, however, entitled to equitable tolling of
28 the statute for other reasons not applicable to Martin.

1 In this case, Martin's responsibilities are clear. Under Rule
 2 8.23(b)(1) of the California Rules of Court, "An attorney or
 3 unrepresented party whose mailing address, telephone number, fax
 4 number, or e-mail address changes while a case is pending must
 5 promptly serve and file a written notice of the change in the
 6 reviewing court in which the case is pending." Cal. R. Ct.
 7 8.23(b)(1).

8 Martin was away from Ironwood from October 15, 2013, until
 9 January 30, 2014. (See Opp'n 4, 26, ECF No. 16.) Under Rule
 10 8.23(b)(1) of the California Rules of Court, Nedds, and Ramirez,
 11 Martin had a duty to act diligently. The mail logs provided show
 12 that even though the California Court of Appeal denied Martin's
 13 petition on October 30, 2013, he did not receive notice of a ruling
 14 until March 6, 2014. (See Opp'n 24, 29, ECF No. 16; Pet'r's Notice
 15 Lodgment 5, ECF No. 18.) The delay, however, appears to be due to
 16 the fact that Petitioner did not notify the court of appeal that
 17 his address had changed. See Appellate Courts Case Information,
 18 California Courts, <http://appellatecases.courtinfo.ca.gov/> (select
 19 "Fourth Appellate District Div 1," search using case number
 20 D064732, then select "Docket"). Martin's failure to notify the
 21 California Court of Appeal of his change of address is not
 22 consistent with a finding of diligence. See Nedds, 678 F.3d at 783
 23 n.4; see also Lozada v. Cripps, No. 09 CIV. 8897(DAB)(THK), 2010 WL
 24 7113583, at *7 (S.D.N.Y. Dec. 17, 2010) (finding that petitioner
 25 had not proceeded diligently where he failed to notify the court
 26 that he had been transferred to a new facility, delaying receipt of
 27 the court's ruling) (citing Spaulding v. Stewart, 13 F. App'x 494,
 28 496 (9th Cir. 2001)); McGuinness v. Pepe, 150 F. Supp. 2d 227, 235

1 (D. Mass. 2001) (finding that because petitioner did not leave a
2 forwarding address with the prison after he was released from
3 custody, he was not entitled to equitable tolling due to delay in
4 receipt of court's ruling).

5 Petitioner's claim that he did not know his case number does
6 not excuse his delay in contacting the court. On February 14,
7 2014, when Martin eventually wrote to the appellate court, he still
8 did not know his case number. (See Opp'n 26-28, ECF No. 16.) The
9 court was nonetheless able to respond to his inquiry. (See id. at
10 24.) Furthermore, in his letter, Martin appears to acknowledge
11 that he was responsible for notifying the court of his change of
12 address. (See id. at 26.)

13 Even under Ramirez, Petitioner has to prove that the "delay of
14 notice caused the untimeliness of his filing and made a timely
15 filing impossible[.]" See Ramirez, 571 F.3d at 998 (emphasis
16 added). One hundred thirty days passed between the time the
17 California Court of Appeal denied Martin's habeas petition and when
18 he filed his petition with the California Supreme Court. This left
19 him with 235 days to bring his claims under AEDPA. But Martin had
20 already delayed 220 days before filing his first habeas petition in
21 superior court and then waited 60 days after the California Supreme
22 Court ruling before filing his Petition in this Court. If he had
23 not delayed filing the state petitions, he would have been able to
24 meet AEDPA's statute of limitations, even with the delayed receipt
25 of the appellate court's ruling. Thus, the belated receipt of the
26 opinion was not the sole cause of the untimeliness of a federal
27 petition. See Ramirez, 571 F.3d at 997; Niebla, 2013 WL 1688346,
28 at *8. Martin is not entitled to equitable tolling on this basis.

b. Prison transfers and loss of personal property

Next, Martin claims that due to the above-described prison transfers, he was without his property and legal materials from approximately October 15, 2013, to May 15, 2014. (Opp'n 4, ECF No. 16.) Despite not having his personal property during this time, Petitioner was still able to file his petition with the California Supreme Court. (*Id.*) In the Reply, Respondent argues that transferring between prisons does not qualify as an extraordinary circumstance justifying equitable tolling. (Reply 3, ECF No. 23.)

As a general matter, prison transfers do not constitute grounds for equitable tolling. *See Johnson v. Hill*, 224 F. App'x 641, 641 (9th Cir. 2007) (denying request for equitable tolling where petitioner failed to demonstrate that frequent prison transfers constituted an extraordinary circumstance that made it impossible to file a timely petition); *Ranteesi v. Swarthout*, No. 2:13-cv-2482 KJM CKD P, 2014 WL 7150245, at *3 (E.D. Cal. Dec. 15, 2014) (finding that prison transfer did not constitute extraordinary circumstance warranting equitable tolling).

Moreover, while lack of access to legal materials may provide a basis for tolling, *see Lott v. Mueller*, 304 F.3d 918, 924 (9th Cir. 2002), Martin has failed to provide any evidence showing that the circumstances under which he was incarcerated prevented him from timely filing his habeas corpus petition. *See Ramirez*, 571 F.3d at 998 (finding that equitable tolling may apply where a complete lack of access to legal materials made timely filing impossible). Here, Martin filed his petition in the California Supreme Court during the time he was purportedly without his personal property and legal material. (*See* Opp'n 4, ECF No. 16.)

1 This undermines the argument that without these items, it was
2 impossible to file his federal petition. See Reyes v. Martel, No.
3 08-CV-0791-JLS (PCL), 2009 WL 857010, at *8 (S.D. Cal. Mar. 30,
4 2009) (denying claim that petitioner was entitled to equitable
5 tolling in light of fact that he was able to file petition with the
6 California Supreme Court raising the same claim as in his federal
7 petition, despite lack of access to legal materials). Petitioner
8 fails to show that he is entitled to equitable tolling of the time
9 period prior to filing his petition in the California Supreme
10 Court.

11 **3. Delay in filing federal petition**

12 Finally, Petitioner insists that he was delayed in filing his
13 Petition in this Court because he was busy investigating his
14 claims. (Opp'n 5, ECF No. 16.) He contends that prison transfers
15 impeded his investigation and caused some of his personal property
16 to become lost or stolen. (Id.) Yet, Martin does not explain what
17 he needed to investigate or how he acted diligently in his
18 investigation. See Holland, 560 U.S. at 653 (describing
19 diligence); Perdigone v. Davis, 584 F. App'x 850, 851 (9th Cir.
20 2014) (finding that difficulty of investigating claims while in
21 prison did not constitute an extraordinary circumstance that
22 prevented a timely filing). Further, Martin does not explain what
23 materials were lost or stolen or why they were necessary for him to
24 file his Petition. See Farmer v. Biter, No. CV 12-6557-DMG (CW),
25 2013 WL 3989447, at *7 (C.D. Cal. July 31, 2013) ("Petitioner does
26 not suggest what, if any, particular items he needed but was unable
27 to access and for how long, or show that lack of access to his
28 personal property precluded a timely filing.").

1 Martin, on the other hand, was able to constructively file a
2 state habeas petition with the California Supreme Court on March 9,
3 2014, presumably with the same burdens he recounts here. (See
4 Lodgment No. 7, In re Martin, No. S217309 (petition for writ of
5 habeas corpus at 13).) On July 13, 2014, his Petition was
6 constructively filed in federal court. (Pet. 22, ECF No. 1.) The
7 claims raised in the federal petition mirror those raised with the
8 California Supreme Court. (Compare Pet. 6-8, ECF No. 1 (describing
9 three grounds for relief), with Lodgment No. 7, In re Martin, No.
10 S217309 (petition for writ of habeas corpus at 5-7) (describing the
11 same three grounds for relief in nearly identical language).)
12 Martin has not shown that he was unable to file a federal petition
13 because of lost property, a need to investigate, or any other
14 reason. As a result, he is not entitled to equitable tolling.

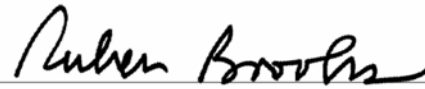
15 IV. CONCLUSION

16 For the reasons explained above, Respondent Beard's Motion to
17 Dismiss should be **GRANTED**. This Report and Recommendation will be
18 submitted to the United States District Court Judge assigned to
19 this case, pursuant to the provisions of 28 U.S.C. § 636(b)(1).
20 Any party may file written objections with the Court and serve a
21 copy on all parties on or before June 15, 2015. The document
22 should be captioned "Objections to Report and Recommendation." Any
23 reply to the objections shall be served and filed on or before June
24 29, 2015. The parties are advised that failure to file objections
25 within the specified time may waive the right to appeal the
26
27
28

1 district court's order. Martinez v. Ylst, 951 F.2d 1153, 1157 (9th
2 Cir. 1991).

3 **IT IS SO ORDERED.**

4 DATED: May 14, 2015



Ruben B. Brooks
United States Magistrate Judge

5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28